(6)

No. 89-1629

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SALVE REGINA COLLEGE,
PETITIONER

v.

SHARON L. RUSSELL,
RESPONDENT

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE FORD MOTOR COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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MOTION FOR LEAVE TO FILE BRIEF FOR THE FORD MOTOR COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

Pursuant to Rule 37.4 of the Rules of this Court, the Ford Motor Company ("Ford") moves for leave to file the accompanying brief *amicus curiae* in support of respondent. Respondent has consented to the filing of this brief, but counsel for petitioner has not responded to Ford's request for consent.

Ford's interest in this case arises from the fact that it intends to file a petition for a writ of certiorari to review the judgment of the court of appeals in *Ford Motor Co.*

v. *Mahne*, 900 F.2d 83 (6th Cir. 1990). *Mahne* is a product liability action arising out of a 1985 automobile accident that occurred in Florida between Florida residents driving Florida-registered cars. The plaintiff sued first in Michigan state court, but that court dismissed on *forum non conveniens* grounds. She then sued in Florida state court, but voluntarily dismissed the suit after Ford pointed out that it was barred by Florida's 12-year statute of repose. Finally, she sued in federal district court in Michigan. Once again, the trial court dismissed the suit, holding that under Michigan choice-of-law rules, Florida substantive law applied and that the Florida statute of repose barred the action.

The Sixth Circuit—giving no deference whatsoever to the district court's determination of Michigan conflicts law—reversed and held that the substantive law of Michigan, rather than Florida, applied. The court of appeals declined to certify the state-law issues to the Michigan and Florida Supreme Courts.

Ford's certiorari petition in *Mahne* will present the following question: "Whether the court of appeals • • • departed from settled principles governing federal-court determinations of state law by (1) not following decisions of the state supreme court and intermediate appellate courts, thereby encouraging forum shopping by federal diversity plaintiffs, (2) not deferring to the district court's interpretation of the law of the state in which it sits, and (3) not certifying the controlling state-law issues to the state supreme court." *Mahne* thus will present the same issue that is before the Court in this case: whether a court of appeals should defer to a district court's reasonable determination of state law in a diversity case.

Ford seeks leave to file this brief to demonstrate how this case relates to the Sixth Circuit's *Mahne* decision and to emphasize that the longstanding practice of deferring to district court determinations of state law leads to more accurate prediction of state law, promotes judicial economy, and best serves the interests underlying *Erie*.

Respectfully submitted.

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September 1990

QUESTION PRESENTED

Whether a party is entitled to *de novo* review of a federal district judge's determination of state law in a case in which federal jurisdiction is founded upon diversity of citizenship.

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BRIEF FOR THE FORD MOTOR COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The Ford Motor Company ("Ford") submits this brief as *amicus curiae* in support of respondent.

INTEREST OF THE AMICUS CURIAE

As stated in the foregoing motion for leave to file this brief, Ford's interest in this case arises from the fact that it intends to file a petition for a writ of certiorari to review the judgment of the court of appeals in *Ford Motor Co.* v. *Mahne*, 900 F.2d 83 (6th Cir. 1990). *Mahne* is a product liability action filed as a diversity suit in the federal district court in Michigan. The district court dismissed the suit, holding that under Michigan choice-of-law

rules, Florida substantive law applied and that the Florida 12-year statute of repose barred the action. The Sixth Circuit—giving no deference whatsoever to the district court's determination of Michigan conflicts law—reversed and held that the substantive law of Michigan, rather than Florida, applied.

Ford's certiorari petition in *Mahne* will present the following question: "Whether the court of appeals * * * departed from settled principles governing federal-court determinations of state law by (1) not following decisions of the state supreme court and intermediate appellate courts, thereby encouraging forum shopping by federal diversity plaintiffs, (2) not deferring to the district court's interpretation of the law of the state in which it sits, and (3) not certifying the controlling state-law issues to the state supreme court." *Mahne* thus will present the same issue that is before the Court in this case: whether a court of appeals should defer to a district court's reasonable determination of state law in a diversity case.

SUMMARY OF ARGUMENT

The issue in this case is whether a court of appeals is required to engage in *de novo* review of determinations of state law made by federal district judges in diversity cases. Nearly all of the circuits say no, holding that considerable deference should be given and that *de novo* review is not required. Although this Court has never before squarely decided the issue, it has repeatedly recognized that state-law determinations by federal district judges sitting in those states are entitled to "great deference" or "special weight." *United States* v. *Hvass*, 482 U.S. 64, 74 n.6 (1987); *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 204 (1956); *Gardner* v. *New Jersey*, 329 U.S. 565, 575 (1947).

De novo review should not be required for three reasons. First, a district judge sitting in a particular state is more likely than a circuit judge to be familiar with the law of that state and the operation of the state courts. District judges regularly try diversity cases involving the law of the forum state and most district judges were leading practitioners or judges in the state before being appointed to the federal bench. By contrast, court of appeals judges may come from any of the states in the circuit and cannot be expected to have specialized expertise on the law of each state in the circuit.

Second, deference promotes judicial economy. Federal court determinations of state law can be rejected as incorrect by even the lowest-level state courts. It makes little sense to devote the scarce resources of the federal appellate courts to deciding legal issues *de novo* when those decisions are of such limited precedential value. The same interests of judicial economy that counsel against review of state-law issues by this Court warrant deference to the district courts by the courts of appeals.

Third, the interests underlying the *Erie* doctrine are best served by *not* establishing court of appeals precedent on state-law issues that would bind the district courts in the circuit. Federal district courts should look always to the state courts—and not to the federal courts of appeals—to determine issues of state law. *De novo* review would be contrary to the federalism interests reflected in *Erie*.

ARGUMENT

THIS COURT SHOULD REAFFIRM THE LONG-HELD, MAJORITY VIEW THAT COURTS OF APPEALS SHOULD DEFER TO DISTRICT COURT DETERMINATIONS OF STATE LAW QUESTIONS

The centerpiece of petitioner's argument is that "[t]he right to at least one appeal is firmly rooted in our jurisprudence" (Br. 22) and that such an appeal must include *de novo* review of all legal issues. Of course, petitioner's central premise is incorrect; there is no absolute right to an appeal, even in criminal cases. *Ross* v. *Moffitt*, 417 U.S. 600, 606 (1974); *McKane* v. *Durston*, 153 U.S. 684 (1894). Moreover, this Court has never held that when an appeal is granted by statute the appellate court must decide all legal issues *de novo*. To the contrary, it is well accepted that appellate courts review mixed questions of law and fact in a deferential manner. And this Court has recently held that courts of appeals should review certain legal determinations deferentially. *Cooter & Gell* v. *Hartmarx Corp.*, 110 S. Ct. 2447, 2459-2461 (1990) (the abuse of discretion standard applies to appellate review of legal determinations under Rule 11); *Pierce* v. *Underwood*, 487 U.S. 552, 558-563 (1988) (the legal determination of whether the government's position was "substantially justified" under the Equal Access to Justice Act is reviewed under an abuse of discretion standard).

There are no absolute rules as to what standard of appellate review is required in every case. Instead, the appellate courts properly employ the standard that best serves the ends of justice in a particular context. This Court has repeatedly recognized that " 'as a matter of the sound administration of justice,' deference [is] owed to the 'judicial actor * * * better positioned than another to decide the issue in question.' " *Cooter & Gell*, 110 S. Ct.

at 2459-2460, citing *Pierce* v. *Underwood*, 487 U.S. at 559-560, and *Miller* v. *Fenton*, 474 U.S. 104, 114 (1985). In both *Cooter & Gell* and *Pierce* this Court "concluded that [the] district court's rulings on legal issues should be reviewed deferentially." 110 S. Ct. at 2460; 487 U.S. at 560-561. Petitioner's claim that *de novo* appellate review of legal determinations is required in every case is therefore completely untenable. And as we demonstrate below, the remainder of petitioner's claim—essentially that the interests of sound judicial administration and the principles underlying *Erie* require *de novo* review—is equally incorrect.

A. Ever Since *Erie*, The Courts Of Appeals Have Wisely Deferred To District Court Determinations Of State Law

From shortly after this Court decided *Erie R.R. Co.* v. *Tompkins* until 1984, the federal courts of appeals were of the unanimous view that district court determinations of state law in diversity cases were entitled to substantial deference. The Eighth Circuit was the first to apply the rule of deference, doing so only five years after *Erie*. *Magill* v. *Travelers Ins. Co.*, 133 F.2d 709, 713 (8th Cir.), cert. denied, 319 U.S. 773 (1943). See also *Russell* v. *Turner*, 148 F.2d 562, 564 (8th Cir. 1945). Over the next forty years, *all* of the other circuits followed the Eighth Circuit's lead. And even though federal legislation governing appellate review of district court decisions has been amended several times over those years, Congress has never voiced any objection to the deferential approach taken by the courts of appeals.

The courts articulated the degree of deference somewhat differently from circuit to circuit. Some held that district court determinations are entitled to "great weight," "much deference," or "substantial deference." Other courts indi-

cated that such determinations carry "extraordinary force." And some even went so far as to hold that district court determinations of state law cannot be disturbed unless "clearly erroneous."[1]

[1] See, *e.g.*, *Hull* v. *Eaton Corp.*, 825 F.2d 448, 454 n.9 (D.C. Cir. 1987) (district judge's determination of local law "carr[ies] extraordinary force on appeal"); *Garcia* v. *Friesecke*, 597 F.2d 284, 295 (1st Cir.), cert. denied, 444 U.S. 940 (1979) ("[m]uch deference is accorded to a district court's construction of the law of the locality in which it sits"); *Lomartira* v. *American Auto. Ins. Co.*, 371 F.2d 550, 554 (2d Cir. 1967) ("great weight should be given the determination of a district judge sitting in that state"); *Saludes* v. *Ramos*, 744 F.2d 992, 994 (3d Cir. 1984) ("the district judge's prediction of state law is weighty because of his or her familiarity with the particular jurisdiction"); *Caspary* v. *Louisiana Land & Exploration Co.*, 707 F.2d 785, 788 n.5 (4th Cir. 1983) ("[we] are disposed to accord substantial deference to the opinion of a federal district judge because of his familiarity with the state law which must be applied"); *Avery* v. *Maremont Corp.*, 628 F.2d 441, 446 (5th Cir. 1980) ("[a] federal district court judge's determination on the law in his state is, as a rule, entitled to great weight on review"); *Wilson* v. *Beebe*, 770 F.2d 578, 580 (6th Cir. 1985) (en banc) ("it is this court's practice to accept the 'considered view' of a district judge who has reached a 'permissible conclusion' "); *Lamb* v. *Briggs Mfg.*, 700 F.2d 1092, 1094 (7th Cir. 1983) ("the district court's construction of state law * * * is entitled to great weight on appellate review"); *Luke* v. *American Family Mut. Ins. Co.*, 476 F.2d 1015, 1019 n.6 (8th Cir. 1972), aff'd en banc, 476 F.2d 1023, 1025 (8th Cir.), cert. denied, 414 U.S. 856 (1973) ("[w]e give great weight to the view of the state law taken by the district judge experienced in the law of that state"); *Portland Gen. Elec. Co.* v. *Pacific Indem. Co.*, 574 F.2d 469, 471 (9th Cir. 1978) ("[a]n Appellate Court should give great weight to the determinations of state law made by a district judge experienced in the law of that state"); *Mullan* v. *Quickie Aircraft Corp.*, 797 F.2d 845, 850 (10th Cir. 1986) ("[i]n reviewing the interpretation and application of state law by a resident federal judge sitting in a diversity action, we are governed by the clearly erroneous standard"); *Alabama Elec. Coop.* v. *First Nat'l Bank*, 684 F.2d 789, 792 (11th Cir. 1982) ("the interpretation of state law by a federal district judge sitting in that state is entitled to deference").

In concluding that deference is required, the courts of appeals frequently relied on this Court's acknowledgment of a district judge's expertise on matters of local law in *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198 (1956). "Since the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what the Vermont law is." 350 U.S. at 204. This Court made the same point in *United States* v. *Hohri*, 482 U.S. 64, 74 n.6 (1987):

> [T]hese cases are tried before local federal district judges, who are likely to be familiar with the applicable state law. Indeed, a district judge's determination of a state-law question usually is reviewed with great deference.

See also *Gardner* v. *New Jersey*, 329 U.S. 565, 575 (1947) ("[t]hat construction of New Jersey law made by a federal judge of the New Jersey District Court is entitled to special weight").

None of the courts of appeals has held that district court determinations of state law are *conclusively* presumed to be correct. To the contrary, the courts acknowledge that parties to diversity actions are entitled to meaningful appellate review of state law determinations. But when the state's highest court has not spoken on the issue, and more than one reasonable interpretation of the law of a state is possible, that given by the district court sitting in the state is entitled to considerable deference. In this case, the First Circuit applied the traditional rule, and upheld the district court's reasonable state-law determination "[i]n view of the customary appellate deference accorded to interpretations of state law made by federal judges of that state." Pet. App. 12.

In 1984, by a 6-5 vote, the Ninth Circuit radically departed from the traditional requirement of deference, hold-

ing that *de novo* review of all district court determinations of state law was mandatory. *In re McLinn*, 739 F.2d 1395 (9th Cir. 1984) (en banc). Although most of the courts of appeals have revisited the deference issue since *McLinn* was decided, before the Sixth Circuit's decision in *Mahne* only the Third Circuit followed *McLinn* and discarded the rule of deference.[2]

As the five dissenting judges in *McLinn* pointed out (739 F.2d at 1403), the Ninth Circuit majority required *de novo* review without analyzing the purpose of the traditional rule of deference or the practical effect of its rejection:

> The result can only serve as a disincentive to our district courts to explore and explain the authorities which bear on an issue of local law. It will tend to deprive the litigants of the benefit of that effort. It will encourage unsuccessful counsel to appeal on the assumption that reversals will become more frequent. Our own work will multiply. Sadly, the majority arrives at this result without an analysis of purpose, and in the face of overwhelming authority from the other circuits. We are not told why this novel view, rather than the standards applied by other circuit courts, is required to reach a just result in this or any other case.

Indeed, close examination reveals that deference to district court determinations promotes more accurate decision-making, conserves judicial resources, and gives full respect to the interests of federalism underlying the *Erie* doctrine.

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[2] *Craig* v. *Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 148 (3d Cir. 1988). In *Mahne*, the Sixth Circuit failed to apply the rule of deference without explanation of its rationale.

B. District Court Judges Are Generally In A Better Position To Determine Issues Of State Law

As this Court, several commentators,[3] and nearly all of the courts of appeals have recognized, district judges are generally in a better position to determine issues of state law than court of appeals judges. This is true for two reasons. First, district judges regularly try diversity cases governed by the law of the forum state. They are thus likely to achieve a substantial working familiarity with state law. "As a practical matter district judges hear a great number of cases involving the law of their home states." *In re McLinn*, 739 F.2d at 1405 (Schroeder, J., dissenting).[4] In fact, diversity cases account for more than 24% of the docket of federal district courts. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 9 Table 4, 14 Table 5 (1988). By contrast, less than 15% of the courts of appeals' docket consists of diversity cases, and each circuit has jurisdiction over several states. *Id.* at 145-146 Table 8-1A. A district judge sitting in a particular state thus spends far more time considering issues arising under the law of that state than a circuit judge could be expected to spend.[5]

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[3] See, *e.g.*, 19 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4507 at 106-107 (1982); Woods, *The* Erie *Enigma: Appellate Review of Conclusions of Law*, 26 ARIZ. L. REV. 755, 759 (1984); Note, *The Law/Fact Distinction and Unsettled Law in the Federal Courts*, 64 TEXAS L. REV. 157, 186-187 (1985).

[4] See also Note, *The Law/Fact Distinction and Unsettled Law in the Federal Courts*, 64 TEXAS L. REV. at 186-187.

[5] This case illustrates how much more likely a district judge is than a circuit judge to consider a case under the law of the state where he or she sits. It involved Rhode Island law and was de-

(Footnote continued on following page)

Second, district judges nearly always have had extensive experience as judges or practitioners in the state before being appointed to the federal bench. A circuit judge considering a diversity case, by contrast, may come from any of the states in the circuit and may have no first-hand experience with the state law involved in the case. "[D]istrict judges generally have practiced within a state for some years while [court of appeals] judges, more often than not, have no similar relationship to the law of the state in question." *In re McLinn*, 739 F.2d at 1405 (Schroeder, J., dissenting).[6] This Court recognized as much

[5] *continued*
cided by a district judge sitting in Rhode Island. Only 7.6% of the cases on the First Circuit docket comes from Rhode Island. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 150 Table B 3. Extrapolating from these numbers, we can compare the 24% of the typical district court docket that consists of diversity cases, with the 1.1% (7.6% times 15%) of the First Circuit docket that consists of Rhode Island diversity cases. *Id.* at 145-146 Table 8-1A, 150 Table B 3. It is clear that Rhode Island district judges will consider many more Rhode Island diversity cases than First Circuit judges will review.

[6] See also 19 C. Wright, A. Miller & C. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4507 at 106 ("[a]s a general proposition, a federal court judge who sits in a particular state, especially one who has practiced before its courts, may be better able to resolve complex questions as to the law of that state than is a federal judge who has no such personal acquaintance with the law of the state"); Woods, *The* Erie *Enigma: Appellate Review of Conclusions of Law*, 26 ARIZ. L. REV. at 759 ("trial judges who are nurtured in a state's legal system have, more likely than not, a better predictive 'feel' for the processes of the state judicial system than appeals courts who bring the cold objectivity of ignorance to the task"); Note, *The Law/Fact Distinction and Unsettled State Law in the Federal Courts*, 64 TEXAS L. REV. at 186-187; Comment, *Deference to Federal Circuit Court Interpretations of Unsettled State Law:* Factors, Etc., Inc. v. Pro Arts, Inc., 1982 DUKE L.J. 704, 711.

in *Bernhardt*, holding that "[s]ince the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what the Vermont law is." 350 U.S. at 204. See also *Cooter & Gell*, 110 S. Ct. at 2460 (deference to district court legal determinations under Rule 11 is warranted because "[t]he district court is best acquainted with the local bar's litigation practices"); *United States* v. *Hohri*, 482 U.S. at 74 n.6 ("local federal district judges * * * are likely to be familiar with the applicable state law").[7]

This case supplies a good example. The state-law determination at issue was made by District Judge Ronald R. Lagueux. Judge Lagueux practiced law in Rhode Island for thirteen years and was Associate Justice of the Rhode Island Superior Court for eighteen additional years before becoming a federal district judge. 1 ALMANAC OF THE FEDERAL JUDICIARY 1st Circuit 17 (1990). The court of appeals panel that reviewed the decision consisted of circuit judges from New Hampshire, Puerto Rico and Connecticut. In these circumstances, it was certainly prudent for the court of appeals to defer to Judge Lagueux's expert judgment on the law of Rhode Island.

[7] Similarly, although this Court does not generally grant certiorari to review unsettled state-law issues, when a case is otherwise before it the Court will defer to the interpretation of the lower court that is more likely to be knowledgeable about state law. *Runyon* v. *McCrary*, 427 U.S. 160, 181-182 (1976); *Bishop* v. *Wood*, 426 U.S. 341, 346 & n.10 (1976). Even though this Court could review such issues *de novo*, it recognizes the wisdom of deferring to local expertise.

C. Deference To District Court Determinations Of State Law Promotes Judicial Economy

Deference to district court determinations of state law also promotes judicial economy and conserves the scarce resources of the courts of appeals. This is true for two reasons.[8] First, the appellate court is faced with a far more difficult task when it must review a trial court's legal determinations *de novo* than when its review is limited to deciding whether the determination was reasonable. "It can hardly be disputed that application of a non-deferential standard of review requires a greater investment of appellate resources." *United States* v. *McConney*, 728 F.2d 1195, 1201 n.7 (9th Cir.), cert. denied, 469 U.S. 824 (1984).[9]

In addition, *de novo* review would inevitably increase the likelihood that a court of appeals would second-guess and reverse a district court and thus would encourage appeals even in cases in which there is little or no basis in state precedent for reaching a different result. As the dissenting judges in *McLinn* put it, "the majority signals

[8] Placing the primary responsibility on the district courts to determine questions of state law would promote the interests of judicial economy in yet a third respect: if the appellate court is uncertain over whether the district court's interpretation of state law is correct, it would have an increased incentive to use certification procedures now available in a majority of states. If the court of appeals could simply reverse the district court on *de novo* review, it would be less likely to certify the question to the state courts. This Court should use the present case to remind appellate courts of the advisability of using certification procedures (rather than *de novo* appellate review) when those courts disagree with district courts on unsettled questions of state law. See *Elkins* v. *Moreno*, 435 U.S. 647, 663 n.16 (1978); *Lehman Bros.* v. *Schein*, 416 U.S. 386, 391 (1974).

[9] See also, Note, *The Law/Fact Distinction and Unsettled State Law in the Federal Courts*, 64 TEXAS L. REV. at 187-189.

to litigants that reversals will be easier to obtain, thus encouraging more appeals." 739 F.2d at 1406. And more appeals and more reversals would also mean more remands, retrials and subsequent appeals. In sum, there can be no doubt that *de novo* review would substantially increase the workload of the already-overburdened federal courts.

Of course, concerns over judicial economy sometimes must give way to other considerations; if the long-term benefit of requiring *de novo* review outweighs the cost, it should be required. Even assuming *arguendo* that *de novo* review would improve decisionmaking—which, for the reasons previously explained, it will not—it would not be worth the cost. Federal court determinations of unsettled state law questions are not binding on state courts and can be rejected as incorrect by even the lowest court in the state. Thus, one of the most important reasons for allowing *de novo* appellate review—to establish a body of precedent to guide the lower courts—is totally absent in diversity cases. "[T]he investment of appellate energy" is not justified because it "will [not] produce the normal law-clarifying benefits that come from an appellate decision on a question of law." *Pierce* v. *Underwood*, 487 U.S. at 561. See also *Cooter & Gell*, 110 S. Ct. at 2460.

What the American Law Institute pointed out with respect to diversity jurisdiction in general is equally applicable to *de novo* appellate review of state law:

> From the point of view of the federal courts, the task of deciding such cases under state law imposes especially laborious burdens, often greater in fact than involved in resolving issues of federal law on which those courts may speak with their own authority. And although they may occasionally contribute to the development of state law, those heavy labors are essentially wasteful. Lacking the status of authorized

> precedent and avowedly aiming to project state court decisions, they go for the most part only to the adjudication of the particular dispute between the actual parties.

American Law Institute, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 99-100 (1968). Accordingly, even if the Court were to embrace the dubious assumption that *de novo* review would improve the accuracy of decisionmaking, that marginal improvement in particular cases would not justify the additional burden on the appellate courts.[10]

D. The Rule Of Deference Best Serves The Interests Underlying The *Erie* Doctrine

Prior to this Court's decision in *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), federal courts were deemed to have independent authority to resolve questions of general common law, even if their resolution conflicted with decisions of the highest court of the state. *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842). Back then, as Justice Holmes put it in the *Taxicab Case*, "[t]he often repeated proposition of this and the lower Courts [was] that the parties are entitled to an independent judgment on matters of general law." *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U.S. 518, 533 (1928) (Holmes, J., dissenting).

[10] The judicial efficiency concerns that warrant deference in this situation are similar to the concerns that have led this Court as a general matter to decline to review lower court rulings on questions of unsettled state law. Because even a decision by this Court would have no binding effect on state courts, independent review of such questions would constitute a waste of the Court's resources. *Haring* v. *Prosise*, 462 U.S. 306, 314 n.8 (1983); Sup. Ct. R. 10.

Erie changed all that and made it clear that our system of federalism requires that state common law—as decided by the highest court in the state—be given full effect in the federal courts:

> Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

304 U.S. at 78.

In addition to holding that the rule of *Swift* v. *Tyson* offended the structure of federalism embodied in the Constitution, the Court emphasized that the rule promoted forum shopping. "*Swift* v. *Tyson* * * * made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court." *Id.* at 74-75. To preserve federalism and to prevent forum shopping, the Court held that federal courts in diversity cases must look to the state courts to determine questions of state common law, such as the questions involved in this case.

The interests underlying *Erie* are best served by *not* establishing court of appeals precedent on state law issues that would be binding on other district courts. Federal district courts should look to the state courts—and not to the federal courts of appeals—to determine issues of state law, responding with sensitivity to the latest indications of state policy (whether or not directly controlling,

and whether expressed in holding or in dictum). Under the deferential approach taken by the majority of circuits, courts of appeals do not issue binding rulings that particular district court interpretations of state law are correct or incorrect, but instead merely determine whether those interpretations are reasonable in light of current rulings of the state courts. District courts deciding subsequent cases therefore should look not to what the court of appeals has said, but solely to the latest pronouncements of state law by the state courts.

As a practical matter, if *de novo* review of district court determinations of state law were required, a district court would be bound by the court of appeals' interpretation of state law and would be most unlikely to render a different interpretation unless the state's highest court had in the meantime expressly rejected the court of appeals' decision. *De novo* review would thus "distort the appellate process" and "establish the circuit law in a most peculiar, secondhanded fashion." *Pierce* v. *Underwood*, 487 U.S. at 561. Because the federal district court would inevitably place great reliance on the court of appeals' decision (which would, for the most part, be ignored by state courts), the possibility of forum shopping (*i.e.*, the possibility that a different or more certain result could be anticipated by filing suit in federal court rather than in state court) would increase. The federal courts would no longer be simply predicting state law, they would instead be establishing a separate, competing body of state law that would be looked to in future cases. That is just what *Erie* counsels against.

In *McLinn*, the Ninth Circuit held that "independent" appellate review of state law determinations was appropriate because appellate courts are structurally better suited to resolve legal issues. 739 F.2d at 1398. "[A]ppellate

judges are freer to concentrate on legal questions"; "the collaborative, deliberative process of appellate courts reduces the risk of judicial error on questions of law." *Ibid.* *De novo* should be required, the Ninth Circuit reasoned, because appellate courts are expert at deciding questions of law:

> The policy concerns supporting the de novo standard apply as well to questions of state law as to questions of federal law. The appellate function is the same in each case and the same structural advantages encourage correct legal determinations.

Ibid. Petitioner repeats these arguments in its brief in this Court. Br. 24-26.

If *Erie* stands for anything, however, it is that the judicial function of federal courts—most certainly including the appellate function—is not the same in diversity cases involving state law as it is in cases governed by federal law. The mode of appellate decisionmaking the Ninth Circuit and petitioner advocate sounds very much like that which Justice Holmes condemned in the *Taxicab Case*. They argue once again "that the parties are entitled to an independent judgment on matters of general law" and that there is a "transcendental body of law" that appellate courts, through careful research, policy analysis, deliberation and collaboration, can better discover. 276 U.S. at 533.

But as Justice Holmes and later Justice Brandeis pointed out, there is no transcendental body of law to be discovered, no need to carry out the same research and policy analysis required in federal cases, and no need to conduct the same kind of appellate review as is required in cases under federal law. Instead, federal courts in *Erie* cases are required to do something quite different: to predict what the state's highest court would hold without

regard to their own policy predilections.[11] That is a prediction that can be better made by a judge sitting in and coming from the state in question. And it is an ongoing predictive process, made in the light of accumulating precedent from state courts at all levels, which is endangered when federal courts of appeals prescribe separate bodies of federal precedent binding on federal district courts until rejected by the highest court of the state.[12]

De novo review is thus not only inefficient and uneconomical, but it would also represent a step backward toward *Swift* v. *Tyson* and independent consideration of state-law issues by the federal courts. It should not be required.

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[11] In *McLinn*, the court of appeals seemed particularly concerned that under the deferential standard of review, conflicting district court decisions on the same state-law issue might be entitled to affirmance as reasonable interpretations of state law. 739 F.2d at 1402 n.3. But that is a normal by-product of the predictive process required by *Erie*, particularly where state law is truly unsettled. Federal courts should *not* try to answer once and for all questions of state law. Instead, they should attempt in each and every case to predict what the state's highest court would say. Different results are not necessarily bad. They are part of a fluid process that continues until the state's highest court resolves the issue. They are "live cell[s] in the tree of justice." Corbin, *The Laws of the Several States*, 50 YALE L.J. 762, 776 (1941).

[12] As we point out above (n.8), the predictive process required by *Erie* would be far better served by using the certification procedures available under state law than by deciding state-law questions *de novo* on appeal.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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